



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

In Re: 06948127

DATE: JAN. 13, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for an Advanced Degree Professional

The Petitioner, a venture capital, private equity and management consulting business, seeks to employ the Beneficiary as managing director. It requests advanced degree professional classification for the Beneficiary under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based “EB-2” immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on the grounds that the Petitioner did not establish its ability to pay the proffered wage and did not establish that the Beneficiary meets the educational requirements of the labor certification. On appeal the Petitioner submits additional documentation and asserts that the evidence of record overcomes both grounds for denial.

Upon *de novo* review, we will withdraw the Director’s decision. We find that the record now establishes that the Beneficiary meets the educational requirements of the labor certification. We remand the case for further consideration of the Petitioner’s ability to pay the proffered wage, and the issuance of a new decision on that issue.

**I. LAW**

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

## II. ANALYSIS

### A. Educational Requirements of the Labor Certification

To qualify for the requested classification the Beneficiary must meet the specific educational, training, experience, and any other requirements of the labor certification. *See* 8 C.F.R. § 204.5(a)(2). As specified in section H of the labor certification, the minimum educational requirement in this case is a master's degree in business administration (MBA) or a foreign educational equivalent. The Petitioner asserts that the Beneficiary meets this requirement by virtue of an MBA granted in 2013 by [redacted] in [redacted] Massachusetts.

The Director found that the evidence of the Beneficiary's MBA degree did not include an "official academic record" as required by the regulation at 8 C.F.R. § 204.5(k)(3)(i)(A). On appeal the Petitioner has remedied this shortcoming by submitting the pertinent document. Accordingly, the Petitioner has overcome this ground for denial.

### B. Petitioner's Ability to Pay the Proffered Wage

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated in the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date<sup>1</sup> of the petition onward. The priority date in this case is November 27, 2017. The labor certification states that the wage offered for the job of managing director is \$187,637 per year.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of

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<sup>1</sup> The "priority date" of a petition is the date the underlying labor certification is filed with the DOL. *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied as of the priority date.

evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage. In this case the labor certification indicates that the Beneficiary has been employed by the Petitioner since October 1, 2016. No records have been submitted, however, to indicate how much compensation the Beneficiary has received since then. Accordingly, the Petitioner has not established its continuing ability to pay the proffered wage based on wages paid to the Beneficiary from the priority date onward.

Absent evidence that the Petitioner has paid the Beneficiary a salary equal to or above the proffered wage from the priority date onward, USCIS will generally examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage, or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year.

In this case the record indicates that the Petitioner is a single member LLC (limited liability company) wholly owned by its senior managing director. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership, or a corporation. If the LLC has only one owner it will automatically be treated as a sole proprietorship by the Internal Revenue Service (IRS) unless an election is made to be treated as a corporation. If a single-owner LLC does not elect its classification, a default classification of disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election is made using IRS Form 8832, Entity Classification Election.

If an LLC elects to be treated as a corporation, it is taxed as a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.<sup>2</sup> An investor's liability is limited to their initial investment. As the owners and others are only liable to the extent of their initial investment, the total income and assets of the owners and others, and their personal ability to pay the company's debts and obligations, cannot be utilized to demonstrate the LLC's ability to pay a proffered wage. The LLC must show the ability to pay a proffered wage out of its own funds.

If an LLC elects to be treated as a sole proprietorship, a business in which one person operates the business in his or her personal capacity,<sup>3</sup> it does not exist as an entity apart from the individual owner for tax purposes. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Accordingly, the sole proprietor's adjusted gross income, assets, and personal liabilities are also considered as part of the LLC's ability to pay a proffered wage. Sole proprietors report income and expenses from their businesses on their individual federal income tax return (Form 1040) each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds.

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<sup>2</sup> While this general rule might be amenable to alteration pursuant to contract or otherwise, there is no evidence in the record to indicate that the general rule is inapplicable in this case.

<sup>3</sup> *Black's Law Dictionary* 1398 (7th Ed. 1999).

In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

In this case the record includes the LLC owner's completed federal income tax return for 2017 and a draft return for 2018 (unfiled at the time of submission to USCIS). Neither return includes an IRS Form 8832. Thus, it would appear that no entity classification election has been made by the LLC owner, in which case the petitioning LLC would be taxed as a sole proprietorship in accordance with applicable regulations. The record is unclear on this point, however, and this lack of clarity as to the Petitioner's tax classification is reflected in the Director's decision.

In denying the petition, the Director initially referred to the Petitioner as a sole proprietorship whose ability to pay the proffered wage must include consideration of the sole proprietor's adjusted gross income, assets and personal liabilities, as well as his ability to sustain himself and his family. Then, after noting that the Petitioner's net income in 2017 was -\$27,201 and thus clearly insufficient to pay the proffered wage of \$187,637, the Director stated that the Petitioner does not have net current assets that are separate from the owner's personal assets. The Director went on to state that USCIS only considers the Petitioner's net income and net current assets, and not the sole proprietor's personal assets, in determining the Petitioner's ability to pay the proffered wage. These latter statements are true only if the Petitioner elected to be treated as a corporation for tax purposes, and they contradict the Director's earlier characterization of the Petitioner as a sole proprietorship for tax purposes.

In view of these inconsistencies in the Director's decision, we will remand this matter for further consideration. The Director should confirm the Petitioner's tax classification and, at his discretion, may request any other documentation deemed relevant in determining the Petitioner's ability to pay the proffered wage. The Petitioner may also submit materials in support of the factors discussed in *Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967), which allows the Director to consider the totality of the circumstances affecting the Petitioner's ability to pay the proffered wage.

### III. CONCLUSION

We will remand this case to the Director for further consideration of the Petitioner's ability to pay the proffered wage from the priority date onward.

**ORDER:** The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.